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No. 01-518

IN THE
SUPREME COURT OF THE UNITED STATES

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

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PETITIONER'S REPLY BRIEF

Maurice Baskin
Counsel of Record for Petitioner
Venable, LLP
1201 New York Ave., N.W., Suite 1000
Washington, D.C. 20005
202-962-4800

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PETITIONER'S REPLY

I. The Opposing Briefs Have Failed to Justify the Board's Double Standard by Which First Amendment Protection is Being Denied to Suits Against Non-Employee Labor Organizations, in Direct Conflict With Holdings of This Court and the Courts of Appeals.

In its Petition, BE&K has argued that the decisions of the NLRB and the Sixth Circuit depart from the plain language of this Court's holdings in *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49

(1993); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) and *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), by finding unlawful a non-frivolous lawsuit brought in good faith by an employer against non-employee labor organizations. As further demonstrated by the *amicus curiae* brief filed on behalf of the business community, the decisions below will have a demonstrable chilling effect on the ability of employers to petition the courts, absent reversal by this Court, because of the inherent uncertainty of all litigation. (Amicus Br. at 4, 8, 16). No employer will be able to seek judicial redress against labor unions without facing an unacceptable risk of violating the NLRA under the standard announced by the Board in this case.

The briefs in opposition to BE&K's Petition have misstated important principles of law and fact. If anything, they highlight the confusion and weakened constitutional protections engendered by the Board's misguided interpretation of this Court's holdings. It is necessary for the Court to grant the Petition in order to reconcile the conflicting holdings now surrounding employer-union litigation.

At the outset, the NLRB's brief appears to concede that the decisions below create a double standard never before contemplated by this Court in its holdings under the First Amendment. According to the opposing brief: "[W]hereas a plaintiff is insulated from antitrust liability for filing a suit so long as it had an objective basis for the suit (even if the litigant does not ultimately prevail), an employer is subject to liability for committing an unfair labor practice if its retaliatory suit fails." (NLRB Br. at 13). The Board's brief purports to justify such a distinction in labor law because of "the special economic dependency of employees on their employers." (Id.). Yet the present case does not involve a suit against employees, but involves only a suit against non-employee labor organizations.

There was no "economic dependency" at issue here. Rather, well-financed non-employee labor organizations initiated a campaign of attrition in judicial and administrative proceedings against BE&K for the purpose of interfering with the relationship between an innocent employer and its neutral customer. BE&K took the only steps it could take under the circumstances: it went to court to seek redress from the union attacks under the secondary boycott laws and the antitrust laws. BE&K was advised by legal experts that its suit had "merit," and the Petitioner at all times had an objective basis for litigating in defense of its business.

Under *Professional Real Estate Investors*, BE&K's suit was unquestionably protected by the First Amendment, even after it did not "prevail," because it was certainly not "objectively baseless." Indeed, the Ninth Circuit found that BE&K's suit raised "troubling" issues, and it was the *union defendants* who asked for time to consider filing a petition for rehearing due to their dissatisfaction with the Ninth Circuit's holding.[1]

The NLRB's opposition brief asserts myopically that the Board's finding of unlawfulness here does not "chill" employers because *Bill Johnson's* "ensures that the employer may file a non-frivolous lawsuit and have it adjudicated on the merits by the courts." (NLRB Br. at 14). As this Court recognized in *Professional Real Estate Investors*, however, businesses are entitled to more than just the right to "file" an antitrust suit under the First Amendment. They are also entitled at the *conclusion* of the litigation not to be second-

[1] The NLRB's brief wrongly states that Petitioner "does not question" the Board's application of *Bill Johnson's* to federal, as opposed to state, litigation. (NLRB Br. at 10, n.2). To the contrary, BE&K has directly opposed the Board's expansion of *Bill Johnson's* to litigation sanctioned by the antitrust laws and the secondary boycott laws, at every stage of this case, including the Petition to this Court. (See, e.g., Pet. at 4-5, 17).

guessed as to their motives for filing legal action, provided that their suit has "merit" in the sense of not being "objectively baseless." It is this standard of protection which is completely overridden by the Board's misinterpretation of *Bill Johnson's Restaurants. See White v. Lee*, 227 F. 3d 1214, 1235-36 (9th Cir. 2000); *Petrochem Insulation, Inc. v. NLRB*, 240 F. 3d 26, 27 (D.C. Cir. 2001), cert. den., No. 01-92 (Oct. 29, 2001).[2]

Closely intertwined with the Board's misapplication of *Bill Johnson's* First Amendment standard is the Board's (and the Sixth Circuit's) discounting of the distinction between suits against employees and suits against unions. Contrary to the opposition briefs, *Lechmere, Inc. v. NLRB, supra*, established beyond peradventure that Sections 7 and 8 of the NLRA codify a fundamental distinction between employees and labor organizations. Employees have rights that labor organizations do not have, and employees are entitled to protections which simply do not apply to labor organizations.

The opposition briefs deliberately ignore the basic lessons of *Lechmere* and the plain language of *Bill Johnson's* in order to support the Board's decision below. First, the Board's brief misleadingly cites *Bill Johnson's* as holding that it is an unfair labor practice for an employer "to prosecute an unmeritorious lawsuit for a retaliatory purpose." (NLRB Br. at 2). *Bill Johnson's* does not so hold. Instead, the

[2] The opposing briefs assert that this Court's denial of the petition for writ of certiorari in *Petrochem* should control the outcome here. (NLRB Br. at 9). The business community disagrees, having chosen to file an amicus brief in support of BE&K, while not supporting *Petrochem*, (Amicus Br. at 13). Certainly, the present petition raises important legal issues in a much more compelling factual setting than did *Petrochem*. In the latter case, the employer's litigation was "charitably" characterized by the reviewing court as "utterly meritless," whereas BE&K's suit was found by the Ninth Circuit to have an objective basis and to raise "troubling" issues.

Court declared unequivocally that an employer could commit an unfair labor practice only by prosecuting an unmeritorious lawsuit for a retaliatory purpose against "*employees*." 461 U.S. at 731, 740, 744. The Court was careful to refer only to suits against "employees" throughout its opinion, and at no time did the Court state or imply that a suit against a non-employee labor organization constituted an unfair labor practice.[3]

Nor do the opposing briefs in this case reconcile the decisions below with the plain language of Section 8(a)(1) of the Act. This Court has *never* held that an employer can violate the Act's prohibition against interference with "employee" rights solely by taking an action against a non-employee labor organization. To so hold ignores the careful definitions of employees and labor organizations under the NLRA, as this Court plainly held in *Lechmere*. *See* 29 U.S.C. 152(3) and 152(5). Thus, contrary to the opposing briefs, the Sixth Circuit holding directly conflicts with the Ninth Circuit's reading of *Lechmere* as expressed in *Diamond Walnut Growers, Inc. v. NLRB*, 53 F. 3d 1085 (9th Cir. 1995).

The Board's answer to *Lechmere* asserts that the Court's holding there was somehow limited to trespass cases. (NLRB Br. at 14). But this Court did not so limit its holding in *Lechmere*, nor does Section 7 itself anywhere distinguish between trespass actions and other forums to which the Act applies. Rather, the Court unequivocally held that Section 7 does not apply to non-employee "union organizers." Likewise, Section 8(a)(1) does not prohibit interference with the rights of "labor organizations (except in trespass actions)." Instead Section 8(a)(1) does not give rights to labor

[3] The *amicus curiae* brief correctly points out the numerous times that the Bill Johnson's court limited its holding to suits against "employees." (Amicus Br. at 19, n. 8). Neither of the opposing briefs identifies any aspect of *Bill Johnson's* in which this Court ever extended its holding to non-employee labor organizations.

organizations at all, but only prohibits interference with the rights of "employees."

The opposition briefs also wrongly attempt to gloss over the severely defective nature of the findings below on the question of retaliatory motivation. (NLRB Br. at 17-18; U. Br. at 12). The NLRB brief does not address at all the unauthorized nature of the rationale adopted by the Sixth Circuit, which did not appear in the Board's analysis. The Union Intervenors incorrectly attempt to distinguish this Court's holding in *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), which plainly prohibits the courts from adopting rationales not set forth in NLRB opinions. Clearly, in the present case, the Sixth Circuit found wanting the NLRB's stated legal justification for finding unlawful motivation on the part of BE&K. The court therefore improperly substituted a new legal justification of its own, in a manner which further conflicts with federal antitrust laws. This Court's review is essential in order to clarify how retaliatory motivation should properly be identified after litigation concludes in the labor context.[4]

Finally, the opposition briefs misstate the holding of *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters*, 456 U.S. 717 (1982). (NLRB Br. at 19-20; U. Br. at14). Contrary to their arguments, the result in the present case directly conflicts with this Court's prior holding that prevailing parties under Section 303 of the Labor Management Relations Act should not be awarded attorneys fees.

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[4] The opposing briefs fail to explain away the direct conflicts between the Sixth Circuit findings of retaliatory motive and the contrary holdings of *NLRB v. Local 520, IUOE*, 15 F. 3d 677, 680 (7th Cir. 1994); and *NLRB v. Vanguard Tours, Inc.*, 981 F. 2d 62, 65 (2d Cir. 1992). Both of those cases refused to permit the NLRB to find retaliatory motivation primarily on the basis of an employer's failure to prevail in litigation.

Thus, notwithstanding the claims made by the opposing briefs, BE&K's petition raises significant issues of great importance which call for resolution by this Court. In the words of the amicus curiae brief, the NLRB and Sixth Circuit decisions "emasculate employer rights preserved under the Act and the First Amendment right to Petition the Courts for redress of grievances." (Amicus Br. at 3). Review by this Court is essential to resolve the conflicting legal principles raised by the decisions below.

CONCLUSION

For the reasons set forth above and in BE&K's Petition, the decisions of the Sixth Circuit and the NLRB present direct conflicts with holdings of this Court and other courts on issues of great importance. The Court should grant the writ of certiorari.

Respectfully submitted,

Maurice Baskin
Venable, LLP
1201 New York Ave., N.W.,
Suite 1000
Washington, D.C. 20005
202-962-4800

Counsel of Record for Petitioner BE&K